STATE OF MINNESOTA,

SUPREME COURT.

GEORGE W. GILBERT and HENRY ASH,
Appellants,

vs.

GEORGE THOMSON,
Respondent.

STATEMENT OF CASE.

This is an appeal from an order from the district court of Wabasha County made at the November term, A. D. 1868, overruling a motion for a new trial.

The original action was in ejectment. The complaint is in the usual form. It avers title in fee and right of possession in the plaintiff to the east half south-east quarter of section 10, town 108, north of range 11 west, in Wabasha County, that the defendant is in and wrongfully and unlawfully withholds the possession and prays judgment, etc.

The answer admits possession and denies all the other allegations of the complaint.

The action was tried at the June term, 1868, before said court and a jury, and resulted in a verdict for defendant.

A "case" was made in which the questions now raised appear.

The errors complained of are all in reference to the admission or exclusion of testimony.

The plaintiff offered and read in evidence a deed in fee of the property in question, from Oliver Monette and Amelia Monette, his wife, to the plaintiffs in due form, etc., dated May 29, 1867, and with it the defendant's admission in court that said Amelia Monette, formerly Amelia McNair, was the grantee of the United States of this property, and that at the date of the deed aforesaid, she was the wife of said Oliver Monette, and rested.

The defendant then offered and read in evidence a power of attorney from Amelia McNair to Benjamin Lawrence bearing date May 27, 1857, which contained full and broad words of authority to take possession of, and to lease, bargain and sell at the discretion of the attorney any and all lands of which she then was, *or thereafter might become seized* in said county and to convey by deed the same, etc.

The defendant then offered in evidence a deed from Amelia McNair by Benjamin Lawrence, attorney, to F. S. Richards of this property, bearing date July 18, 1857, to the admission of which the plaintiff objected, which objection was overruled by the court, and the plaintiff excepted.

This deed being read to the jury the defendant offered and read in evidence a deed of the same lands from said Richards and wife to Rodman Birchard, bearing date Jan. 18, 1859, and the plaintiff then admitting that the defendant was in possession of the premises under a contract of purchase from Birchard, the defendant rested.

Copies of all said deeds and said power of attorney are made a part of the "case." (See Paper Book, pages 8 to 14 inclusive.)

The plaintiffs then called as a witness said Amelia Monette, who testified that she was a half-breed or mixed blood, of the Dacotah or Sioux nation of Indians—that in May, 1857, her name was Amelia McNair—that she then lived in Prairie du Chien, Wisconsin, and that she did not then, and does not now know Benjamin Lawrence, and never had any business with him.

The plaintiffs then sought to prove by her, and also by A. P. Foster, by them called as a witness, in substance that said Amelia Monette was one of the beneficiaries, under the treaty of Prairie du Chien of July 15, 1830; that half-breed scrip was issued to her as such under the act of congress of July 17, 1854, upon that subject; that on the 29th day of May, 1857, the date of said power of attorney she at Prairie du Chien sold, transferred and delivered to said A. P. Foster said scrip for a money consideration then paid her by him therefor; that said power of attorney was executed and delivered to said Foster; that said power and the whole transaction was designed to evade and defeat, and was in violation of the terms and policy of said act of congress of July 17, 1854; that subsequently a part of said scrip was located on the land in question by said Foster, after which the deed to Richards under the power was executed, and to prove further by said Foster that said power of attorney was never delivered to said Lawrence, that said Foster sold the land to Richards, who paid him, Foster, therefor, for his own benefit and not for the benefit of Amelia McNair, to whom he, Foster, in whole or in part never accounted,

that Foster did all the business and that Lawrence had nothing to do in the whole matter except to execute the deed to Richards, as directed by Foster.

To develop these facts, numerous questions were asked these witnesses by the plaintiffs, to which and to the facts so sought to be proven, the defendant objected as irrelevant and immaterial. The court sustained the objection and excluded the testimony. The plaintiff excepted. The jury returned a verdict for the defendant. (See Paper Book, page 5 to page 8, and folios 5 to 15 inclusive.)

POINTS AND AUTHORITIES FOR APPELLANTS.

I.

We respectfully submit the court erred in admitting in evidence the deed from Amelia McNair by Lawrence, attorney to F. S. Richards, and for the following reasons, to-wit:

First—The deed describes no lands. The only description is in the following words and figures:

"All that tract or parcel of land lying and being in Wabasha County, Territory of Minnesota, described as follows, viz.: The east half of southeast quarter of section 10, town 108, range 11."

However well we may guess what these cabalistic letters and figures may mean, we submit they are insufficient intelligently and legally in an instrument of the solemnity of a deed to describe lands, and that for this reason the deed is void for uncertainty.

Second—The instrument as the deed of Amelia McNair was never acknowledged. The acknowledgment reads thus:

"Be it known that on the 18th day of July, A. D. 1857, before the undersigned, personally came Benjamin Lawrence, attorney for Amelia McNair, the *obligator* in the above deed from her to F. S. Richards, to me personally known to be the identical person described in and who executed the said deed and he acknowledged that he executed the same freely and voluntarily for the uses and purposes therein expressed.

"JOHN W. BURNHAM,
"Justice of the Peace."

There is no grantor named in that acknowledgment. "Obligator" does not mean grantor, nor as used does it mean anything. At most, this is the individual acknowledgment of Benjamin Lawrence of "his" deed. "He acknowledged that he executed," etc.—not that Amelia McNair by her said attorney acknowledged nor that the attorney as such attorney acknowledged the deed to be the deed of said Amelia McNair.

II.

We submit that in excluding the testimony offered to prove and which clearly tended to prove that the supposed arrangement between Mr. Foster and Amelia McNair, in reference to her scrip and the power of attorney from her to Lawrence and the deed to Richards of the land in question, were void as not only intended to evade and defeat, but as in direct violation of the act of congress, the court below manifestly erred. We shall not examine each question propounded to the witnesses and the ruling of the court thereon, but direct our attention to the one substantive and important proposition involved in this part of the case, for if we are right in this the court was necessarily in error, and if we are wrong in this it is practically unimportant whether the court was in all the minutia of its holdings in this regard correct or not.

The act of congress of July 17, 1854, which provides for the issuance of this half-breed scrip, and in pursuance of whose provisions the same was issued, contains the following proviso at the conclusion of section 1 of that act, to-wit:

"And provided further, That no transfer or conveyance of any of said certificates or scrip shall be valid."

United States Statutes at large, Vol. 10, page 304.

The characteristics of these mixed bloods, and the object of congress in providing in express terms that all transfers or conveyances of this scrip shall be void, no one can fail to understand or appreciate. Those objects and reasons are of such a nature as to furnish neither counsel nor courts with any excuse or apology for narrowing by construction the scope of that inhibition. We well understand that thirst for speculation and greed for gain have prompted to some, perhaps to a great extent, either an open contempt for that law or a more wily and circuitous effort to evade and defeat its wholesome and necessary provisions, but we insist that every principle of law and of legal and judicial morality, and of public policy, demands of the court, with a power proportionate to the frequency and boldness of these efforts, to declare them void.

If all transfers and conveyances of this scrip are void, all efforts by indirection to work transfers and conveyances, and especially with the well defined object and purpose of securing such transfers and conveyances by such indirect means, will and must result alike fatally. This was precisely what we proposed to prove and what the court held to be irrelevant and immaterial.

We are not aware of any case that has arisen under this act, except the case of Cronin and others vs. Dugan and Wife in the circuit court of the United States for

Minnesota, decided at the June term, A. D. 1867, by a full court, Judge Miller presiding. Of course, the case is not reported. Messrs. Bigelow & Clark of St. Paul and S. L. Campbell of Wabasha (the latter being counsel for defendant in this action), were attorneys for plaintiffs and Wilder & Williston and Smith & Gilman were attorneys for defendants. The defendants claimed title under a half-breed scrip entry and a deed from the half-breed under a power of attorney. That power of attorney was in the words and figures following, to-wit:

"Know all men by these presents, That I, Scott Campbell, of the County of Brown and State of Minnesota, have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint Madison Sweetser of Fort Wayne, Indiana, my true and lawful attorney, for me and in my name and stead to bargain, sell, alien and convey any and all tracts of land which I may now own or hereafter acquire, whereever situated, by virtue of the location of half-breed Sioux scrips issued to me in accordance with an act of congress approved July 17, A. D. 1854, entitled an act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dakotah or Sioux nation of Indians and for other purposes. All of said land so acquired to be sold for such price or sum of money as he may see fit and upon such terms and conditions as in his judgment may seem proper; and by deed or by title bonds or other assurances of title to make, execute and deliver for me and in my name as may be necessary or proper covenants of title and warranty against all incumbrances of whatever kind or nature, and of the proceeds of said sales to reserve and pay himself the sum of five thousand dollars, which I acknowledge to be justly due and owing from me, party of the first part to said Madison Sweetser, party of the second, and the power of attorney is hereby declared to be a power coupled with an interest and wholly irre-

vocable by me until the said indebtedness and interest is fully paid and satisfied. And I further covenant and agree to and with the said Madison Sweetser, that I will not sell, alien, convey, lease, mortgage or encumber in any manner any of said land located by said half-breed Sioux scrip as aforesaid, until said debt and interest is fully paid and satisfied; hereby ratifying and confirming whatever my said attorney may lawfully do in the premises by virtue of these presents.

"The scrip hereinbefore mentioned may be more fully described by piece, containing forty (40) acres letter A number four hundred and nineteen (419). One piece forty (40) acres letter B numbered four hundred and nineteen (419). One piece eighty (80) acres letter C numbered four hundred and nineteen (419). One piece one hundred and sixty (160) acres letter D numbered four hundred and nineteen (419), and one piece one hundred and sixty (160) acres letter E numbered four hundred and nineteen (419), making in all four hundred and eighty acres.

"In witness whereof I have hereunto set my hand and seal this sixteenth day of November, eighteen hundrd and fifty-eight.

"SCOTT CAMPBELL. (Seal.)"

It was in all respects properly executed.

The deed from the half-breed under the power of attorney was in all respects in due form and duly executed June 15, 1863.

The court held the power of attorney and the deed thereunder to be upon their face void, as in violation of and against the policy of the act of congress aforesaid, and excluded them from the jury for that reason. Though adverse to us we thought then, and still think, the ruling correct, and we see no reason why that decision is not in its length and breadth an authority here. True, we do not claim that the power of attorney in this case shows sufficient upon its face as in that, to render it void, but we proposed to prove by both parties to the transaction, that is, Amelia McNair and A. P.

Foster, the facts to show the object and intent of the parties, which Judge Miller held in the other case, sufficiently appeared in the power itself.

St. Peter Co. vs. Bunke, 5 Minn. Rep., page 192.
Evans vs. Folsom, 5 Minn. Rep., page 422.
Ferguson vs. Kumler, 11 Minn. Rep., page 104.
Bruggerman vs. Hoerr, 7 Minn. Rep., page 337.
First Parsons on Contracts, Second Edition, page 381 and 2 and cases cited.
First Kent's Com., page 468 margin.
Second Kent's Com., page 467 margin, in note.
Fourteenth Mass. Rep., page 322.
Fifth Johnson's Rep., page 327.
Fourth Pet. U. S. Rep., page 410.

III.

The parties are not *in pari delicto,* nor is their relative position such that the courts will leave them and the lands in question as it finds them, for

First—These half-breeds were, and were recognized as, the *wards* of the government, by reason of their personal condition and qualities, and hence, the provision in the act of congress quoted above.

Second—This scrip was and long before the sale to Foster had been the property of Amelia McNair. That sale and all instrumentalities designed to consummate and perfect it were void. It would be a monstrous legal absurdity to say, that as a result of this, and of the application of the act of congress, she lost or forfeited either the scrip or the land subsequently located therewith. It was *her* scrip that was located upon this land. It was located in her name. She became and was under that location the grantee of the government. The

patent issued to her. Though the sale and transfer of the scrip and the power of attorney and the deed thereunder were void, she never lost either the scrip or the land, but the land became and was hers, both at law and in equity, by the location of the scrip and the recognition of that location by the United States, in the issuance to her of the patent. Her subsequent sale and conveyance of the premises in question to the plaintiffs in this action vested in them a perfect title to the property.

WILDER & WILLISTON, and
J. N. MURDOCK,
Attorneys for Appellants.

Red Wing, July 20, 1869.